Affin Bank Bhd v Chandran G Nair & Ors (all three are partners practising in the legal firm, Thevin Chandran & Associates)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22 NCVC-886–07 OF 2012
YEOH WEE SIAM J
23 APRIL 2013

Legal Profession — Duty of care — Negligence — Breach — Negligence in preparing bankruptcy notice and conducting bankruptcy proceedings — Failing to act on judgment within limitation period — Standard of care and skill of ordinary competent solicitors — 'But for' test to determine causation — Contributory negligence of client in not instructing solicitors in clear terms

Tort — Negligence — Professional negligence — Legal profession — Duty of care — Breach — Negligence in preparing bankruptcy notice and conducting bankruptcy proceedings — Failing to act on judgment within limitation period — Standard of care and skill of ordinary competent solicitors — 'But for' test to determine causation — Contributory negligence of client in not instructing solicitors in clear terms

The plaintiffs had appointed the defendants as their advocates and solicitors to undertake legal proceedings against one Abdul Rashid. On 17 May 1996, the plaintiff entered into an amended consent judgment ('the judgment') with Abd Rashid. On the 2 August 1996, the plaintiff instructed the defendants to commence bankruptcy proceedings. The defendants caused the bankruptcy notice ('BN') to be issued on 24 May 2000 and served it on Abd Rashid on 23 November 2001. However, the High Court allowed Abd Rashid's application to set aside the BN on the grounds that the BN contained an amount of costs totaling RM669.75 that was never provided for in the judgment. The defendants filed an appeal to the Court of Appeal against that decision. The plaintiff subsequently commenced this suit against the defendants claiming that the defendants were negligent in: (i) including the sum of RM669.75 in the BN; (ii) failing to claim compound interest; (iii) failing to file an affidavit in reply to the affidavit of Abd Rashid; (iv) advising the plaintiff to appeal to the Court of Appeal, when there was no chance of success, instead of filing a fresh BN when the court decided that the earlier BN was defective; (v) failing to file the BN afresh when instructed to do so by the plaintiff; (vi) failing to act on the judgment within the limitation period of 12 years; and (vii) failing to reply to the letters of the plaintiff's new solicitors,

Messrs Jaafar & Menon. The plaintiff claimed the sum of RM5,520,236.77 as damages.

Held, allowing the plaintiff's claim with costs of RM15,000:

(1) As advocates and solicitors, the defendants were bound to exercise the care and skill of ordinary competent practitioners in that field. The test in determining the standard of care of a defendant, who was a professional, is laid down in *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118. The plaintiff bore the burden of proving that the defendants negligently performed or omitted to perform their duty and such negligence or omission was the effective cause of injury or damage to the plaintiff. The test to determine causation is the 'but for' test ie would the damage of which the claimant complains have occurred 'but for' the negligence (or other wrong doing) of the defendant (see paras 16–17, 19–20).

(2) The defendants should not have included the untaxed costs of RM669.75 in the BN since there was no specific amount for costs stated in the judgment. By including such amount, the BN was rendered null and void ab initio. For this reason the application to set aside the BN was allowed. The defendants were negligent (see para 29).

(3) The defendants should have taken the right course of action ie file a fresh BN, instead of advising the plaintiff to appeal to the Court of Appeal since the appeal would have little or no chance of succeeding considering that, in accordance with trite law, the judge had decided that the earlier BN was null and void for having the amount of RM669.75 included as costs. The defendants were negligent (see para 33).

(4) From 30 July 2007 to 15 November 2007, the defendants failed to carry out the plaintiff's instruction to file the fresh BN against Abd Rashid. Abd Rashid was adjudged a bankrupt through a third party on 4 October 2007. After the defendants had known about Abd Rashid's bankruptcy, they failed to monitor the same. Clearly, the defendants had not acted promptly in regard to the plaintiff's instruction given on 30 July 2007 to file a fresh BN. If the defendants had acted immediately in accordance with the plaintiff's instructions, the plaintiff would not have suffered the damage claimed (see paras 39–41).

(5) The defendant should have advised the plaintiff to enforce the judgment as soon as possible before the limitation of 12 years under s 6(3) of the Limitation Act 1953 had set in. The defendants were negligent in not ensuring that the judgment was executed within the statutory time limit (see paras 42–43).

(6) Abd Rashid's notice of intention to challenge the BN was accompanied by an affidavit in support. The defendants failed to reply the said affidavit

which meant the factual averments contained in the affidavit were deemed to be admitted by the plaintiff. By failing to file the affidavit in reply of the plaintiff, the defendants had been negligent (see paras 45–46).

(7) When Messrs Jaffar & Menon took over conduct of the plaintiff's matter from the defendants, they wrote five letters to the defendants seeking clarification on the matter. There was no reply by the defendants to all the five letters. The defendants also subsequently sent the wrong cause papers to Messrs Jaffar & Menon (see paras 47–48 & 52).

(8) But for the above acts of negligence of the defendants, the plaintiff would not have suffered the loss or damage. Hence, the defendants were liable to the plaintiff for the tort of negligence when they failed to exercise reasonable skill and care as ordinary skilled or competent solicitors for the plaintiff (see paras 54–55).

(9) The plaintiff suffered damage as a result of the defendants' negligence when the plaintiff could no longer enforce the judgment due to the onset of time limitation and had lost RM5,520,236.77 being the amount owing to the plaintiff by Abd Rashid (see para 56).

(10) The plaintiff had also contributed to the loss by not instructing the defendants in clear terms to proceed to file a proof of debt ('POD') against Abd Rashid when it knew that the POD had to be filed. The plaintiff had contributed to the loss or damage suffered by 40%. The defendant was thus 60% liable for the amount claimed (see para 68).

[Bahasa Malaysia summary

Plaintif-plaintif telah melantik defendan-defendan sebagai peguambela dan peguamcaranya untuk bertindak dalam satu prosiding guaman terhadap seorang yang bernama Abdul Rashid. Pada 17 Mei 1996, plaintif memeterai satu penghakiman persetujuan terpinda ('penghakiman tersebut') dengan Abd Rashid. Pada 2 Ogos 1996, plaintif mengarahkan defendan-defendan untuk memulakan prosiding kebankrapan. Defendan-defendan mengeluarkan notis kebankrapan pada 24 Mei 2000 dan menyampaikannya kepada Abd Rashid pada 23 November 2001. Walau bagaimanapun, mahkamah tinggi membenarkan permohonan Abd Rashid untuk mengetepikan notis kebankrapan tersebut atas alasan bahawa ia mengandungi jumlah kos sebanyak RM669.75 yang tidak diperuntukkan dalam penghakiman. Defendan-defendan memfailkan satu rayuan kepada Mahkamah Rayuan terhadap keputusan tersebut. Plaintif seterusnya memulakan guaman ini terhadap defendan-defendan dengan mendakwa bahawa defendan-defendan cuai dalam: menyertakan jumlah RM669.75 dalam notis kebankrapan; kegagalan menuntut kompaun faedah; kegagalan untuk memfailkan afidavit balasan kepada afidavit Abd Rashid; menasihatkan plaintif untuk merayu kepada Mahkamah Rayuan, sedangkan tiada peluang untuk berjaya, dan

bukan memfailkan notis kebankrapan baharu apabila mahkamah memutuskan notis kebankrapan terdahulu adalah cacat; kegagalan memfailkan notis kebankrapan baharu apabila diarahkan berbuat sedemikian oleh plaintif; kegagalan untuk bertindak terhadap penghakiman dalam had masa 12 tahun; dan kegagalan membalas surat-surat peguambela plaintif yang baharu, Tetuan Jaffar & Menon. Plaintif menuntut jumlah RM5,520,236.77 sebagai ganti rugi.

Diputuskan, membenarkan tuntutan plaintif dengan kos sebanyak RM15,000:

(1) Sebagai peguambela dan peguamcara, defendan-defendan terikat untuk mengambil langkah cermat dan berhati-hati seorang pengamal dalam bidang tersebut. Ujian untuk menentukan standard berhati-hati defendan, seorang profesional, termaktub dalam kes *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118. Plaintif mempunyai beban membuktikan bahawa defendan-defendan cuai dalam menjalankan atau gagal untuk menjalankan kewajipan mereka dan kecuaian atau ketinggalan sedemikian adalah kausa efektif kecederaan atau kerugian bagi plaintif. Ujian untuk menentukan kausa adalah ujian 'but for' iaitu adakah kerugian yang diadukan oleh pengadu akan berlaku 'but for' kecuaian tersebut (atau apa-apa kesalahan) defendan (lihat perenggan 16–17, 19–20).

(2) Defendan-defendan tidak sepatutnya memasukkan kos yang tidak dicukaikan sebanyak RM669.75 dalam notis kebankrapan memandangkan tiada amaun spesifik bagi kos yang dinyatakan dalam penghakiman. Dengan memasukkan amaun sedemikian, notis kebankrapan adalah batal dan tidak sah ab initio. Atas alasan ini, permohonan untuk mengenepikan notis kebankrapan dibenarkan. Defendan-defendan bertindak cuai (lihat perenggan 29).

(3) Defendan-defendan sepatutnya mengambil tindakan yang betul iaitu memfailkan notis kebankrapan baharu, dan bukannya menasihatkan plaintif untuk merayu kepada Mahkamah Rayuan memandangkan rayuan bukanlah sedikit mahupun tidak mempunyai peluang untuk berjaya kerana, selaras dengan undang-undang matan, hakim telah memutuskan notis kebankrapan terdahulu adalah batal dan tidak sah kerana mempunyai amaun RM669.75 sebagai kos. Defendan-defendan telah bertindak cuai (lihat perenggan 33).

(4) Dari 30 Julai hingga 15 November 2007, defendan-defendan gagal mematuhi arahan plaintif untuk memfailkan notis kebankrapan baharu terhadap Abd Rashid. Abd Rashid telah diisytiharkan seorang bankrap menerusi pihak ketiga pada 4 Oktober 2007. Selepas defendan-defendan mendapat tahu mengenai kebankrapan Abd Rashid, mereka gagal untuk mengawalnya. Jelas bahawa defendan-defendan tidak bertindak

sewajarnya berkenaan dengan arahan plaintif yang diberikan pada 30 Julai 2007 untuk memfailkan notis kebankrapan baharu. Sekiranya defendan-defendan bertindak serta-merta sejajar dengan arahan plaintif, plaintif tidak akan mengalami kerugian yang dituntut (lihat perenggan 39–41).

(5) Defendan-defendan sepatutnya menasihatkan plaintif agar menguatkuasakan penghakiman tersebut secepat mungkin sebelum had masa 12 tahun di bawah s 6(3) Akta Had Masa 1953 bermula. Defendan-defendan cuai dalam tidak memastikan bahawa penghakiman telah dijalankan dalam had masa statutori (lihat perenggan 42–43).

(6) Notis niat Abd Rashid untuk mencabar notis kebankrapan disertakan dengan afidavit sokongan. Defendan-defendan gagal untuk membalas afidavit tersebut yang mana bermakna bahawa hujahan fakta yang terkandung dalam afidavit tersebut dikatakan telah diakui oleh plaintif. Dengan kegagalan memfailkan afidavit balasan plaintif, defendan-defendan telah bertindak cuai (lihat perenggan 45–46).

(7) Apabila Tetuan Jaffar & Menon mengambil alih perkara plaintif daripada defendan-defendan, mereka menulis lima surat kepada defendan-defendan untuk mendapatkan penjelasan mengenai perkara tersebut. Tiada balasan oleh defendan-defendan terhadap kelima-lima surat tersebut. Defendan-defendan juga seterusnya telah menghantar surat kausa yang salah kepada Tetuan Jaffar & Menon (lihat perenggan 47–48 & 52).

(8) Namun begitu, bagi kesalahan-kesalahan kecuaian defendan-defendan di atas, plaintif tidak akan mengalami kerugian. Oleh itu, defendan-defendan bertanggungan terhadap plaintif bagi tort kecuaian di mana mereka gagal mengambil langkah kemahiran munasabah dan berhati-hati sebagai peguambela plaintif yang berkemahiran dan kompeten (lihat perenggan 54–55).

(9) Plaintif mengalami kerugian akibat kecuaian defendan-defendan apabila plaintif tidak lagi mampu menguatkuasakan penghakiman akibat bermulanya had masa dan kerugian RM5,520,236.77 iaitu amaun yang terhutang kepada plaintif oleh Abd Rashid (lihat perenggan 56).

(10) Plaintif telah menyumbang terhadap kerugian dengan tidak mengarahkan defendan-defendan dengan terma yang jelas untuk meneruskan dalam pemfailan bukti keberhutangan terhadap Abd Rashid sedangkan ia tahu bahawa bukti keberhutangan telah difailkan. Plaintif telah menyumbang terhadap kerugian yang dialami sebanyak 40%. Oleh itu, defendan-defendan bertanggungan 60% bagi jumlah yang dituntut (lihat perenggan 68).]

Notes

For cases on negligence, see 9 *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1536–1548.

For cases on professional negligence, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1459–1549.

Cases referred to

Bolam v Friern Hospital Management Committee [1957] 2 All ER 118, QBD (refd)

Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685; [2006] 3 CLJ 544, FC (refd)

Chua Seng Sam Realty Sdn Bhd v Say Chong Sdn Bhd & Ors and other appeals [2013] 2 MLJ 29, CA (refd)

Greaves & Co (Contractors) Ltd v Baynham Meikle & Partners [1975] 3 All ER 99, CA (refd)

J Raju a/l Kerpaya v Commerce International Merchant Bankers Bhd [2000] 3 MLJ 177; [2000] 3 CLJ 104, CA (folld)

Low Mun v Chung Kiaw Bank Ltd [1988] 1 MLJ 263; [1987] CLJ Rep 172, SC (folld)

Malayan Banking Bhd v Doxport Technologies (M) Sdn Bhd & Ors [2012] MJLU 958; [2013] 1 CLJ 137, HC (refd)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281; [1995] 1 CLJ 609, CA (refd)

Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee [2004] 3 MLJ 253; [2004] 2 CLJ 787, FC (refd)

Swamy v Matthews & Anor [1968] 1 MLJ 138, FC (refd)

Wu Siew Ying t/a Fuh Lin Bud-Grafting Centre v Gunung Tunggal Quarry & Construction Sdn Bhd & Anor [2011] 2 MLJ 1, FC (refd)

Legislation referred to

Limitation Act 1953 s 6(3)

Murali Menon (V Mugunthan with him) (Jaffar & Menon) for the plaintiff.

Yeoh Cho Kheong (Adeline Yew with him) (Ranjit Singh & Yeoh) for the defendants.

Yeoh Wee Siam J:

THE PLAINTIFF'S CLAIM

[1] Vide the statement of claim (encl 1), the plaintiff claims that the

defendants, as solicitors acting for the plaintiff, had been negligent in executing the amended consent judgment dated 17 May 1996 against one Abdul Rashid Maidin ('Abd Rashid').

[2] The plaintiff is claiming the sum of RM5,520,236.77, being the damage caused to the plaintiff due to the defendants' negligence, and various interests and costs on a solicitor and client basis.

BACKGROUND FACTS

[3] The plaintiffs appointed the defendants as their advocates and solicitors to undertake legal proceedings against one Abdul Rashid (CBOD 2 pp 1–3).

[4] On the 17 May 1996, the plaintiff entered into a consent judgment with Abd Rashid, who was the third among four defendants in Suit No S5–22–75–96 for a sum of RM10,672,079.80 (CBOD2 pp 4–6).

[5] On the 2 August 2996, the plaintiff instructed the defendants to commence bankruptcy proceedings against Abd Rashid and Abdul Ghafur bin Maidin who were jointly and severally liable as guarantors for the loan facility given to Astral Master (M) Sdn Bhd (CBOD 2 p 7).

[6] On the 24 May 2000, the defendants made a request for the issuance of bankruptcy notice dated 24 May 2000 (CBOD 2 pp 8–18).

[7] On 23 November 2001, the defendants served the bankruptcy notice dated 24 May 2000 on Abd Rashid (CBOD2 pp 19–21).

[8] In November 2001, Abd Rashid filed a notice of intention to challenge the bankruptcy notice.

[9] On 10 November 2004, the senior assistant registrar ('SAR') dismissed Abd Rashid's application to set aside the bankruptcy notice.

[10] Vide notice of appeal dated 4 July 2006, Abd Rashid appealed against the decision of the SAR to the judge in chambers (CBOD2 pp 54– 55).

[11] On 13 July 2007, the judge allowed Abd Rashid's appeal on the grounds that the bankruptcy notice contained an amount of costs totaling RM669.75 that was never provided for in the amended consent judgment dated 17 May 1996 (see order dated 13 July 2007 at CBOD 2 pp 4–5 and the grounds of judgment dated 27 August 2007 in CBOD 1 pp 26–31).

[12] On 9 August 2007, the defendants filed a notice of appeal to the Court of Appeal (CBOD 2 p 60).

ISSUE

[13] The issue is whether the defendants, as solicitors for the plaintiff, were negligent in their conduct of the bankruptcy proceedings against Abd Rashid, and other related matters, for and on behalf of the plaintiff.

PARTICULARS OF NEGLIGENCE PLEADED BY THE PLAINTIFF IN THE STATEMENT OF CLAIM ('SOC')

[14] The particulars in para 38 of the SOC setting out the negligence of the defendants can be summarised as follows:

(a) negligently including the sum of RM669.75 in the bankruptcy notice dated 24 May 2000;

(b) failing to claim compound interest from the date of judgment, 17 May 1996, to the date of bankruptcy notice, 24 May 2000;

(c) failing to file an affidavit in reply to the affidavit of the judgment debtor, Abd Rashid, dated 19 July 2000;

(d) advising the plaintiff to appeal to the Court of Appeal, when there is no chance of success, instead of filing a fresh bankruptcy notice when the court decided that the bankruptcy notice dated 24 May 2000 is defective and void on 13 July 2007;

(e) failing to file the bankruptcy notice afresh when instructed to do so by the plaintiff;

(f) failing to act on the amended consent judgment dated 17 May 1996 within the limitation period of 12 years; and

(g) failing to reply to the letters dated 12 February 2010, 2 March 2010, 16 March 2010, 1 April 2010 and 7 September 2010 of the plaintiff's new solicitors, Messrs Jaafar & Menon.

STANDARD OF CARE REQUIRED OF THE DEFENDANTS

[15] In the Federal Court case, *Swamy v Matthews & Anor* [1968] 1 MLJ 138, Barakbah LP held:

> A man or woman who practises a profession is bound to exercise the care and skill of an ordinary competent practitioner in that profession – be it the profession of an accountant, a banker, a doctor, *a solicitor*, or otherwise. (Emphasis added.)

[16] As advocates and solicitors, the defendants are bound to exercise the care and skill of ordinary competent practitioners in that field.

[17] The test in determining the standard of care of a defendant, who is a professional, was laid down in the following dicta of MC Nair J in *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118:

> … but where you get the situation which involves the use of some special skill or competence the test is the standard of the ordinary skilled man exercising and professing to have that special skill.

[18] In *Greaves & Co (Contractors) Ltd v Baynham Meikle & Partners* [1975] 3 All ER 99, Lord Denning MR stated:

> It seems to me that in the ordinary employment of a professional man, whether it is a medical doctor, *a lawyer*, or an accountant, an architect or an engineer, his duty is to use reasonable care and skill in the course of his employment. The extent of this was described by Mc Nair J in *Bolam v Friern Hospital Management Committee*. (Emphasis added.)

THE BURDEN OF PROOF, AND TEST FOR CAUSATION

[19] The plaintiff bears the burden of proving that the defendants negligently performed or omitted to perform their duty and such negligence or omission was the effective cause of injury or damage to the plaintiff.

[20] The test to determine causation is the 'but for' test ie would the damage of which the claimant complains have occurred 'but for' the negligence (or other wrong doing) of the defendant (see Court of Appeal case, *Chua Seng Sam Realty Sdn Bhd v Say Chong Sdn Bhd & Ors and other appeals* [2013] 2 MLJ 29 at pp 36, 38–39).

[21] In the Federal Court case, *Wu Siew Ying t/a Fuh Lin Bud-Grafting Centre v Gunung Tunggal Quarry & Construction Sdn Bhd & Anor* [2011] 2 MLJ 1, Richard Malanjum CJ (Sabah and Sarawak) stated that the 'but for' test is not the exclusive test to be applied to determine causation of the injury. It can still be applied but not in circumstances where there are two or more acts or events, in which case, the test should be: 'whether any of these acts or events or factors materially contributed to the plaintiff's injury … '

WHETHER THE DEFENDANTS ARE NEGLIGENT

[22] The question is whether the defendants had exercised reasonable skill

and care as ordinary skilled solicitors for the plaintiff, or whether the defendants had been negligent in the discharge of their duty of care as solicitors for the plaintiff.

[23] The test would be: but for the negligence of the defendants, would the plaintiff have suffered the loss or damage claimed. In addition: whether any of the acts or events complained of by the plaintiff against the defendants had materially contributed to the plaintiff's injury.

Bankruptcy notice dated 24 May 2000

[24] Messrs Thevin Chandran & Associates included the amount of RM669.75 as costs in the bankruptcy notice dated 24 May 2000. This was not provided for in the amended consent judgment dated 17 May 1996.

[25] The first defendant, Chandran G Nair (DW1), in his witness statement, DW1–WS, admitted that they had included 'costs on consent judgment' amounting to RM669.75 to the bankruptcy notice because they were of the view that such costs could be included.

[26] The question is whether the amount of RM669.75 should be specifically included as costs in the bankruptcy notice when the amended consent judgment dated 17 May 1996 (CBOD 2 pp 4 and 5) did not specify the amount but merely stated that costs are to be borne by the first, second and third defendants of that case, KL High Court Civil Suit No S5–22–75–96, ie the judgment debtors, Astral Master Sdn Bhd, Abd Rashid and Abdul Ghafur bin Maidin.

[27] In *J Raju a/l Kerpaya v Commerce International Merchant Bankers Bhd* [2000] 3 MLJ 177; [2000] 3 CLJ 104 Gopal Sri Ram JCA (as he then was) held:

> When determining an issue under the Bankruptcy Act 1967, it is incumbent upon the court to accord its provisions a strict construction. The consequence of such an approach is that *a bankruptcy notice that requires a debtor to pay a judgment debt otherwise than in accordance with the terms of the judgment is null and void ab initio.* (Emphasis added.)

[28] In *Low Mun v Chung Kiaw Bank Ltd* [1988] 1 MLJ 263; [1987] CLJ Rep 172, Mohd Azmi SCJ held:

> As regards costs, where a judgment is obtained for a certain sum and costs to be taxed, *a bankruptcy notice can be issued for the amount of the judgment without the costs* — see *Re GJ, Ex Parte GJ* [1905] 2 KB 678. *The costs cannot be included or separately relied on until they have been taxedEx Parte The Debtor v Scott* [1954] 3 All ER 74. (Emphasis added.)

[29] Following the above authorities, it is clear that the defendants should not have included the untaxed costs of RM669.75 in the bankruptcy notice since there is no specific amount for costs stated in the amended consent judgment. By including such amount, the bankruptcy notice was rendered null and void ab initio. It was for this reason that the judge allowed Abd Rashid's application and set aside the bankruptcy notice on 13 July 2007.

[30] In this instance, the court holds that the defendants had been negligent in not exercising the reasonable skill and care as required of an ordinary competent solicitor for the plaintiff.

The defendants chose to appeal to the Court of Appeal instead of filing a fresh bankruptcy notice when the bankruptcy notice dated 24 May 2000 was adjudged null and void on 13 July 2007

[31] In *J Raju*'s case it was further held:

> The bankruptcy notice is set aside. The respondent is, of course, at liberty to issue a fresh bankruptcy notice.

[32] In *Jackson and Powell on Professional Liability* (6th Ed) it is stated:

> *Creation of unnecessary risks.*
>
> … It is clearly negligence where there are two ways of doing a thing, and one is clearly right, and the other is doubtful, to do it in the doubtful way.

[33] The defendants should have taken the right course of action ie file a fresh bankruptcy notice, instead of advising the plaintiff to file the notice of appeal to the Court of Appeal since the appeal would have little or no chance of succeeding considering that, in accordance with trite law, the judge had decided that the bankruptcy notice dated 24 May 2000 was null and void for having the amount of RM669.75 included as costs. For this, the defendants have been found to be negligent in the earlier part of this judgment, for not exercising reasonable skill and care as the plaintiff's solicitors.

[34] On 30 July 2007 the plaintiffs instructed the defendants to:

(a) file an appeal to the Court of Appeal; and

(b) at the same time, file a fresh bankruptcy notice against Abd Rashid.

[35] The defendants filed the appeal but not the fresh bankruptcy notice. The defendants did not act until on or about 15 November 2007, about three months later, and conducted a bankruptcy search on Abd Rashid. It was then that the defendants found out that Abd Rashid was adjudged a bankrupt on 4 October 2007 by Messrs Adnan Sundra & Low ('ASL'). The defendants immediately wrote a letter to ASL to seek confirmation of the same. On or about 11 March 2008, ASL confirmed that the adjudicating order and receiving order were obtained against Abd Rashid on 4 October 2007.

[36] On or about 5 March 2009, the defendants conducted a second bankruptcy search on Abd Rashid. The second bankruptcy search showed that Abd Rashid was no longer a bankrupt.

[37] On or about 6 March 2009, the defendants sought confirmation from ASL regarding the second bankruptcy search. No response from ASL was received by the defendants.

[38] On or about 2 February 2010, the plaintiff informed the defendants that Messrs Jaffar & Menon would be taking over conduct of the matter from the defendants.

[39] The court notes that from 30 July 2007 to 15 November 2007, the defendants failed to carry out the plaintiff's instruction to file the fresh bankruptcy notice against Abd Rashid. Abd Rashid was adjudged a bankrupt through a third party on 4 October 2007.

[40] After the defendants had known about Abd Rashid's bankruptcy, they failed to monitor the same from 15 November 2007 (the first bankruptcy search). The second bankruptcy search was only made on 5 March 2009, more than 15 months after the first bankruptcy search. By then, Abd Rashid was no longer a bankrupt.

[41] When the defendants did not receive a reply from ASL regarding the second bankruptcy search, the defendants did not show proof that they did anything until the plaintiff appointed Messrs Jaafar & Menon as its new solicitors for the matter. Clearly, the defendants have not acted promptly in regard to the plaintiff's instruction given on 30 July 2007 to file a fresh bankruptcy notice. If the defendants had acted immediately in accordance with the plaintiff's instructions, the plaintiff would not have suffered the damage

claimed.

The defendants delayed in enforcing the amended consent judgment dated 17 May 1996 by 17 May 2008, and by then the 12 year limitation period for execution of judgment has taken effect

[42] The defendant should have advised the plaintiff to enforce the amended consent judgment as soon as possible before the limitation of 12 years under s 6(3) of the Limitation Act 1953 has set in.

(see also *Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee* [2004] 3 MLJ 253 at p 254; [2004] 2 CLJ 787 at p 788).

[43] The defendants ought to have known that the time limit to commence execution on the amended consent judgment dated 17 May 1996 would expire on 17 May 2008 and therefore it was of utmost urgency to file the bankruptcy notice afresh since there were only nine months left from the time the bankruptcy notice was set aside on 13 July 2007 to enforce the judgment. The defendants were therefore negligent in not ensuring that the amended consent judgment was executed within the statutory time limit.

The defendants failed to reply Abd Rashid's affidavit dated 19 July 2000

[44] Abd Rashid's notice of intention to challenge the bankruptcy notice dated 24 May 2000 was accompanied by an affidavit in support dated 19 July 2000. The defendants failed to reply the said affidavit which means the factual averments contained in the affidavit are deemed to be admitted by the plaintiff (see *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281; [1995] 1 CLJ 609).

[45] It is important that the plaintiff be advised by the defendants to reply Abd Rashid's affidavit because, notwithstanding that the SAR dismissed Abd Rashid's application to set side the bankruptcy notice at first instance, on appeal, the judge allowed Abd Rashid's appeal against the SAR's decision.

[46] The defendants ought to know that the merits of such application, including the totality of affidavit evidence adduced, would have to be considered not only by the SAR, but also the judge. Therefore, by failing to file the affidavit in reply of the plaintiff, the defendants had been negligent in the discharge of their duty of care to the plaintiff as reasonably competent solicitors.

The defendants failed to reply the five letters of the new solicitors for the plaintiff, Messrs Jaffar & Menon, dated 12 February 2010, 2 March 2010, 16 March 2010, 1 April 2010 and 7 September 2010 (CBOD 1 pp 33–43).

[47] When Messrs Jaffar & Menon took over conduct of the plaintiffs matter from the defendants, they wrote a letter dated 12 February 2010 to the defendants, seeking clarification on:

(a) why was there a delay in prosecuting the bankruptcy notice against Abd Rashid and a status report of what had transpired since 1998;

(b) it informed the defendants that the record of appeal was incomplete and sought a complete chronology of events so as to prepare a fresh record of appeal;

(c) why an affidavit in reply was not filed in respect of Abd Rashid's application to set aside the bankruptcy notice.

[48] Subsequently, Messrs Jaffar & Menon wrote four further reminder letters to the defendants. There was no reply by the defendants to all the five letters.

[49] DW1 explained that the letters were faxed to his firm. He had not seen the letters. His only explanation is that his clerks could have kept aside the letters, as the file was already closed, without showing them to him.

[50] The court finds that the excuse given by the defendants is a poor excuse which cannot be accepted considering the importance and urgency of the matter.

[51] As submitted by counsel for the plaintiff, the defendants have breached cl 14.01(2) of the Rules and Rulings of the Bar Council of Malaysia which requires:

> An Advocate and Solicitor must promptly reply to correspondence from other Advocates and solicitors, the Bar Council, State Bar Committee, clients and former clients.

[52] DW1 further stated that by a letter dated 2 February 1010, the defendants' firm had forwarded all the necessary cause papers in respect of Abd Rashid's matter to Messrs Jaffar & Menon (CBOD 2 Part A pp 69 and 70). As pointed out by counsel for the plaintiff, the defendants vide their letter dated 2 February 2010 had in fact sent the wrong cause papers to them ie that of another individual, Abdul Ghafur bin Maidin, and not Abd Rashid.

[53] The above shows clearly the negligence of the defendants in the discharge of their duties to the plaintiff as solicitors. A

[54] But for the above acts of negligence of the defendants, the plaintiff would not have suffered the loss or damage. The acts complained of by the plaintiff against the defendants had materially caused the plaintiff's loss or damage. B

[55] Going by the above findings, the court holds that the defendants are liable to the plaintiff for the tort of negligence when they failed to exercise reasonable skill and care as ordinary skilled or competent solicitors for the plaintiff. C

WHETHER THE PLAINTIFF SUFFERED DAMAGE AS A RESULT OF THE DEFENDANTS' BREACH OF THEIR DUTY OF CARE TO THE PLAINTIFF D

[56] The plaintiff has suffered damage as a result of the defendants' negligence when the plaintiff can no longer enforce the amended consent judgment dated 17 May 1996 due to the onset of time limitation and have lost RM5,520,236.77 which is the amount due and owing to the plaintiff by Abd Rashid. E

[57] The plaintiff proved its damage suffered by adducing a certificate of indebtedness dated 8 March 2012 (exh P1) ('the certificate') issued by the plaintiff for the amount owing as at 17 May 2008 for RM5,520,236.77 which was signed by Habsah bt Yasin, ('Habsah'), officer, special asset management, dated 8 March 2013, for and on behalf of the plaintiff. F G

[58] Counsel for the defendants submitted that the certificate is not admissible since the maker did not come to court to tender it. However, I allowed the certificate to be admitted since the certificate was issued under the plaintiff's letterhead and tendered through PW1, Ong Boon Yow, who is the Head of Large and Medium Loan, in special asset management, and therefore the superior of Habsah. H

[59] In *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685; [2006] 3 CLJ 544, the Federal Court stated: I

> A certificate of indebtedness operates in the field of adjectival law, excusing the plaintiff from adducing the proof of debt and shifting the burden onto the defendant to disprove the amount claimed.

[60] Applying the above case, the defendants can only challenge the amount claimed in the certificate against the defendants, but not the admissibility of the certificate itself.

[61] In *Malayan Banking Bhd v Doxport Technologies (M) Sdn Bhd & Ors* [2012] MJLU 958; [2013] 1 CLJ 137 Lee Swee Seng JC stated:

> [19] There is no evidence led by the defendants which shows that there is any manifest error in the Statement of Amount Due & Owing/Certificate of Indebtedness …
>
> [21] In the absence of evidence to the contrary this court accepts the Statement of Amount Due & Owing/Certificate of Indebtedness as conclusively proving the defendants' indebtedness to the plaintiff.

[62] The defendants did not lead any evidence to prove that the amount owing as stated in exh P1 is erroneous. In the absence of evidence to the contrary, I hold that the amount as stated in exh P1 can be accepted by the court as conclusive proof of what is currently owing by Abd Rashid to the plaintiff.

WHETHER THERE IS CONTRIBUTORY NEGLIGENCE BY THE PLAINTIFF

[63] As stated earlier, Abd Rashid was later adjudged a bankrupt by a third party on 4 October 2007.

[64] The defendants contended that DW2, Mohan Kumar a/l Sakaraipani, the legal assistant of the defendants' firm, Messrs Thevin Chandran & Associates, had called Madam Koh Poi Wah ('Madam Koh'), the plaintiff's officer in charge of this matter, and asked her to furnish him with a statement of accounts to file a proof of debt ('POD') against Abd Rashid. DW2 stated that Madam Koh failed to give the defendants the statement of accounts.

[65] The court notes that DW2's telephone conversation with Madam Koh is not pleaded. Moreover, this alleged conversation is nowhere documented by DW2 or the defendants. The defendants failed to subpoena Madam Koh as a witness to prove the alleged conversation. It is highly probable that there was no such conversation between DW2 and Madam Koh.

[66] In any case, the defendants submitted that even if they did not file the POD on behalf of the plaintiff against Abd Rashid, the plaintiff itself knows about the necessity of filing the POD. This is evidenced by PW1's own admission in court that even though nobody advised him to file the POD, he

knows that he has to file the POD. He also admitted that he could have instructed the defendants to file the POD even if nobody advised him to file the POD.

[67] It is true that by the defendants' failure to advise the plaintiff to file the POD, it had caused the plaintiff to suffer the loss. However, I am of the view that the plaintiff had also contributed to the loss by not instructing the defendants in clear terms to proceed to file the POD when it knows that the POD had to be filed. In the same process, the plaintiff could have supplied the defendants with the statement of accounts so that the POD could be filed by the defendants on behalf of the plaintiff's.

[68] I therefore hold that the plaintiff has contributed to the loss or damage suffered by 40%. The defendant is found to be 60% liable for the amount claimed. Neither the plaintiff nor the defendants called the insolvency officer to give evidence on the current financial capacity of Abd Rashid to pay his debts. In the absence of such evidence, the court proceeds on the basis that the plaintiff's claim against the defendants would be according to the full amount owed by Abd Rashid to the plaintiff.

[69] Accordingly, the court allows the plaintiff's claim and orders the defendants to pay the plaintiff as follows:

(a) the sum of RM5,520,236.77 less 40% for contributory negligence of the plaintiff;

(b) interest at the rate of 5%pa from the date of filing the writ of summons to the date of full realisation; and

(c) costs of RM15,000.

Plaintiff's claim allowed with costs of RM15,000.

Reported by Kanesh Sundrum